1990

Regional Sales Agency, Inc. v. Roland W. Reichert : Unknown

Utah Supreme Court

Bryce E. Roe; Fabian and Clendenin; Attorneys for Respondent.
Ephraim H. Fankhauser, Attorneys for Appellant.

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

REGIONAL SALES AGENCY, INC., a Utah corporation, Plaintiff and Respondent, v. ROLAND W. REICHERT, Defendant and Petitioner.	Petition No. 900029

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petition for Review of Decision of Utah Court of Appeals Reversing in Part and Affirming in Part Judgment of the Third District Court of Salt Lake County

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Bryce E. Roe, Esq.
FABIAN & CLENDENIN, P.C.
215 South State Street
12th Floor
P.O. Box 510210
Salt Lake City, Utah 84151
Attorneys for Respondent

Ephraim H. Fankhauser, Esq.
243 East 400 South, Suite 200
Salt Lake City, Utah 84111
Attorney for Petitioner

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Petitioner, in contravention of Rule 50, Rules of Utah Supreme Court, has not confined himself to arguments first raised in the brief in opposition to the petition for certiorari, but has argued an issue that was never presented to the Utah Court of Appeals, was not urged as a basis for granting the petition for certiorari, and was not treated in respondent's opposing brief. Accordingly, respondent tenders this supplemental brief dealing only with the new issue raised in petitioner's reply.

FACTS

Based upon an affidavit of Ephraim H. Fankhauser, this court is being asked to consider the following facts: Petitioner's counsel, on or about April 6, 1990, became aware for the first time that The Honorable Judith Billings, who wrote the opinion for the Court of Appeals in this case was related by

marriage to Peter Billings and Peter Billings, Jr., who are "partners at Fabian & Clendenin"; that counsel was surprised to learn of this since Judge Billings did not mention it to him or his client; and that petitioner was shocked and felt that he was a victim of injustice based upon his perception of bias on the part of Judge Billings.

Petitioner's statement of facts is erroneous in stating that Peter Billings and Peter Billings, Jr., are partners at Fabian & Clendenin. As the pleadings throughout this case indicate, Fabian & Clendenin is a professional corporation without partners. The Fankhauser affidavit contains no indication of what knowledge, if any, Judge Billings has or had about the financial interests of Peter Billings and Peter Billings, Jr. in this lawsuit, or the manner in which the professional corporation distributes its income. A fact of which this court may take notice is that Peter Billings has been associated with Fabian & Clendenin for 40 years, and that Judge Billings's husband, Thomas T. Billings, is a lawyer in the competing firm of Van Cott, Bagley, Cornwall & McCarthy.

ARGUMENT

I.

Grounds for the Disqualification of Judge Billings Have Not Been Shown

As a basis for contending that Judge Billings should have disqualified herself from hearing this case, petitioner relies upon 78-7-1, Utah Code Annotated, and Canon 3(C)(1)(d)(iii) of the Code of Judicial Conduct. Neither of these authorities, however, require disqualification of Judge Billings.

The code provision, 78-7-1, reads as follows:

> Except by consent of all parties, no justice, judge or justice of the peace shall sit or act as such in any action or proceeding:
>
> (1) in which he is a party, or in which he is interested.
>
> (2) when he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of the common law.
>
> (3) when he has been attorney or counsel for either party in the action or proceeding. * * *

Neither Peter Billings nor Peter Billings, Jr., is a party to this proceeding, and neither has been attorney or counsel for either party in the action or proceeding.

The provision in the Code of Judicial Conduct is somewhat different, though similar. It reads, in part, as follows:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might be reasonably be questioned, including but not limited to instances where:
>
> * * *
>
> (d) The judge or spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:
>
> (i) is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) is acting as a lawyer in the proceeding;
>
> (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iv) is to the judge's knowledge likely to be a material witness in the proceeding;

The cited canon is based on the Model Code of Professional Responsibility and Code of Judicial Conduct of the American Bar Association, as amended. The ABA commentary to (d)(ii) reads as follows:

> Commentary: The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3(C)(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3(C)(1)(d)(iii) may require his disqualification.

An annotation in 50 A.L.R.2d 143, "Relationship to attorney as disqualifying judge," deals, at page 158, with application of the rules to appellate judges:

> It has been held frequently that where an attorney is related to an appellate court member, and is merely associated with the law firm appearing before the appellate court, the appellate court judge is not thereby disqualified in the absence of a showing that the related attorney had a direct pecuniary interest in the outcome of the litigation.

And under the provisions of the cited canon, the interest of the relative must be "substantially affected."

II.

The Raising of the Issue of Judge Billings's Disqualification Is Not Timely

A recent case of this court dealing with disqualification of judges, Madsen v. Prudential Federal Savings & Loan Association, 767 P.2d 538 (Utah 1988), stressed that timeliness is essential in filing a motion to disqualify. Although that case and many of the cases cited in it talk about raising the issue of disqualification at the earliest moment after knowledge of the facts upon which the disqualification is based, we do not read the cases as excluding the general view that the parties have an obligation to make reasonable inquiry as to facts that might demonstrate a basis for some action, and in this case any kind of

reasonable inquiry would have informed petitioner's counsel of the relationship of Judge Billings to employees of Fabian & Clendenin.

Even when a motion to disqualify is made promptly after discovery of the facts, the needs of efficient judicial administration may require that a motion for disqualification be denied. A case representing this point of view is Voltmann v. United Food Co., 147 F.2d 514, 517 (2 Cir.1945). In that case the motion to disqualify the trial judge was made as soon as the plaintiff's attorney learned that a son-in-law of the judge was a member of the firm trying the case. The trial judge denied the motion to disqualify which was made during the ninth day of trial. With respect to this matter, the Court of Appeals said:

> * * * There was no intimation that his son-in-law had anything to do with the case personally or even knew that such an action had been brought. He did, of course, have an interest in the earnings of the firm of which he was a member, but there was nothing to indicate that the fees of his firm were contingent or that the outcome of this trial would make any difference to him financially. No doubt the judge would have declined to sit in the case had he been aware at the outset that there would be any objection to his sitting, and his refusal to sit in cases in which this firm was interested would make assurance doubly sure that no one would feel, however lacking in factual basis the feeling might be, that he could not be imperfectly impartial.
>
> * * *

> The judge was plainly empowered to decide whether "in his opinion" it was such a connection with one of the parties as would make it improper for him to sit. The statute makes the exercise of sound judicial discretion by the judge a test in such circumstances, and if his decision is not shown to have been arbitrary or capricious, there is no abuse of discretion calling for reversal. We think that there was no abuse in this instance. It was late in the trial and the matter was presented for consideration, and though the plaintiffs were in no way responsible for that fact, it was a circumstance to be considered in fairness to all concerned.

It may be assumed that if the matter had been called to Judge Billings's attention, she would have given mature consideration to the question of whether she should be disqualified or not. The respondents had nothing to do with the question of whether she should be disqualified, and it would be unfair to them to set aside the decision of the Court of Appeals on the basis of what might be an "appearance" of impartiality. What might be a ground for disqualification at the beginning of a case, in many instances will not be in the middle or at the end of a case.

In any event, the disqualification of Judge Billings would make no difference in the final outcome since the errors committed by the trial judge were plain. The petition for certiorari should be denied.

DATED this 13 day of April 1990.

Bryce E Roe (Signed)

Bryce E. Roe
FABIAN & CLENDENIN
A Professional Corporation
Attorneys for Plaintiff and
Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 13 day of April 1990, I caused to be mailed, postage prepaid, four true and correct copies of the foregoing RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, to:

Ephraim H. Fankhauser, Esq.
243 East 400 South, Suite 200
Salt Lake City, Utah 84111

Attorney for Petitioner

Bryce E. Roe (Signed)

BER:041390A